POINTS.

The Eighteenth Amendment was legally ratified. The States cannot change the method of ratification provided in Article V by separate action.

Legislative power is clearly distinguished from legislative action.

The term "legislature" means a representative body chosen to act for the people.

The process of adoption; the history of the constitutional Convention; and the decisions of the courts are conclusive that a referendum on a Federal Amendment is not authorized.

CASES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

Nos. 582 and 601.

GEORGE S. HAWKE, *Plaintiff in Error,*

vs.

HARVEY C. SMITH, *Secretary of State of Ohio, Defendant in error.*

BRIEF "AMICI CURIAE."

Agreeable to the permission of the court, this brief is filed to aid in reaching a correct conclusion on the principles of law involved herein.

STATEMENT.

The question as to the validity of a referendum upon the amendment to the Constitution has been presented to this court in case No. 752 from Kentucky, and case No. 788 from New Jersey. We will not repeat the argument we made in those cases but we will supplement it in view of recent decisions on this question.

THE 18TH AMENDMENT WAS LEGALLY RATIFIED BY THE LEGISLATURES OF THREE-FOURTHS OF THE STATES. (See pages six and seven of brief in No. 752.) The contention is, that the people by a referendum have a right to prevent that action of the legislature from becoming operative. It must be

conceded that the authority for amending the Constitution of the United States is found in Article V of the Federal Constitution. The States cannot change that method by individual action. If it is changed, it must be done in a legal and orderly manner, by submitting an amendment to Article V. When the States delegated the power to amend the Constitution of the United States to the Federal Government in Article V, they precluded the possibility of individual action on the part of the States in changing that method.

The Supreme Court of California in the very recent case of Barlotti vs. Lyons, L. A. 6219, said on this point:

> "It is conceded, as necessarily it must be conceded, that in so far as the Constitution of the United States speaks upon the matter of amendments thereto, it controls, and any provision of a State constitution in conflict therewith must be held as naught. Article V of the Constitution, relative to amendments, in so far as is material here, provides: 'The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to the Constitution, or on the application of the legislature of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid, to all intents and purposes, as part of this Constitution, *when ratified by the legislatures of three-fourths of the several States or by conventions in three-fourths, as the one or the other mode of ratification may be proposed by the Congress;* * * *' (The italics are ours.) In the case at bar, the amendment was proposed by the Congress of the United States, and the joint resolution of proposal declared that the amendment would 'Become valid as a part of the Constitution when ratified by the legislatures of the several States as provided by the Constitution.' The effective words of ratification of the joint resolution of our legislature were: 'Resolved by the Senate and the Assembly of the legislature of the State of California, jointly, at its forty-third session * * * that the said proposed amendment be and the same is hereby ratified by the legislature of the State of California.'"

The Supreme Court of Michigan said in a decision rendered April 10, Decher et al. vs. Vaughan:

> "It is elemental that the people of any one State cannot, by any provision in its constitution or laws, amend the Federal Constitution. It was adopted as the supreme law of the republic by the people of all the States, and can be changed only in the manner provided therein. It follows, therefore, that we must look to it alone in determining how such amendment shall be proposed, ratified and adopted. If the language providing therefor is plain and unambiguous, and had a well-defined meaning at the time of its adoption, no one State can give it an interpretation to suit the desire of its people. As was said by Chief Justice Marshall in Cohens vs. State of Virginia, 6 Wheat, 264:
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> > " 'The people made the Constitution, and the people can unmake it. It is the creature of their own will, and lives only by their will. But this supreme and irresistible power to make or unmake, resides only in the whole body of the people; not in any subdivision of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated their power to repelling it.'
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> Justice Story has also said:
>
> > " 'When its words are plain, clear and determinate they require no interpretation and it should therefore be admitted, if at all, with great caution and only from necessity either to escape some absurd consequence or to guard against some fatal evil.' "Story on Constitution, ———.
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> "In an early case in this court (Bay City vs. State Treasurer, 23 Mich., 449), Mr. Justice Cooley, at page 506, said:
>
> > " 'Constitutions do not change with the varying tides of public opinion and desire; the will of the people therein recorded is the same inflexible law until changed by their own deliberative action. * * *

> They (the courts) must construe them as the people did in their adoption, if the means of arriving at that construction are within their power.'
>
> "The purpose of the Constitution was to establish a representative form of government, not a pure democracy in which all power is exercised by the people acting as a whole. While it provides for a popular branch of the legislative department, to be elected at short intervals by the vote is suggestive that neither the President, Vice-President nor United States Senators are to be so elected. It is also significant that when there was a popular demand that Senators should be elected it was not deemed sufficient to provide in the State constitutions for a referendum in making the selection, although the Constitution provided that they 'would be chosen by the legislature,' but an amendment to the Federal Constitution, the seventeenth, was adopted therefor."

LEGISLATIVE POWER AND THE ACT OF A LEGISLATURE RATIFYING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES ARE TWO SEPARATE ACTS, CLEARLY DISTINGUISHABLE. (See pages 9 to 9D of Brief 752.)

There has always been a clear distinction between legislative power and the action of the legislature in performing acts as a designated body. The action of the legislature in ratifying an amendment is not by any reasonable construction of that term "legislative power." It is simply a "yes" or "no" vote upon a proposal by Congress to change the Constitution. The legislature fixes no penalties, prescribes no methods of trial, it has no power to change in the slightest degree any detail of the amendment submitted to it. It acts in the capacity of a convention or a designated body performing a ministerial act. If Congress had authorized the method, of having a convention ratify the 18th Amendment, no one would contend for a moment that the people could have a referendum upon their action. The act of the legislature and the act of the convention is exactly the same. The convention is not exercising legislative power, nor is the legislature itself exercising such power. Oppos-

ing counsel fail to quote any authority for the proposition that our forefathers ever contemplated such a thing as a referendum, or the advisability of a referendum upon the action of the legislature. The court must take the meaning of Article V as it was when it was put into the Constitution. It cannot justly construe into that article what some people conceive to be the proper function of legislative power under an initiative and referendum.

THE TERM "LEGISLATURE" IN ARTICLE V OF THE CONSTITUTION OF THE UNITED STATES MEANS A REPRESENTATIVE BODY CHOSEN TO ACT FOR THE PEOPLE. (See pages 9 to 14 of brief in case 752.)

We have proven in our former brief that by the definition of the term, by the meaning attached to it when the Constitution was adopted, and by the unbroken precedents in its use, the word Legislature means a representative body as distinguished from "legislative power," exercised by the people under a referendum. We again quote from the recent decision of the Supreme Court of California on this point.

> "The question we have in this connection is a very narrow one, being simply one as to the meaning of the word 'legislature' as used in the clause, 'When ratified by *the legislatures* of three-fourths of the several States' of Article V of the Constitution of the United States. If, by these words was meant the *representative bodies* invested with the law-making power of the several States, which existed at the time of the adoption of the Constitution under one name or another in each of the several States, and which have ever since so existed, as distinguished from the law-making power of the respective States, there is nothing left to discuss, for with that meaning attributed to the term 'the legislatures' the constitutional provision is too plain and unambiguous as not to admit of different constructions. The situation would then be that the people of the United States in framing and ratifying the Constitution in the manner provided therein 'have excluded themselves from any direct or immediate agency in

making amendments to it, and have directed that amendments should be made representatively for them, by the Congress of the United States, when two-thirds of both houses shall propose them, or when the legislatures of two-thirds of the several States shall call a convention for proposing amendments, which, in either case become valid, to all intents and purposes, as a part of the Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths of them, as one of the other modes of ratification may be proposed by Congress.' (Dodge vs. Woolsey, 18 How., 331, 348.) As further suggested in this connection in the case just cited, the Constitution of the United States is supreme in the matter of amendments regardless of whether or not the method prescribed thereby 'be right or wrong politically.'

"It certainly is not in consonance with the ordinary acceptation of the term 'legislature' to take it as meaning otherwise than a representative body selected by the people of a State and invested with the power of law making for the State, whatever be the power reserved to the people themselves to view the action of that body or to initiate and adopt laws. Our own Constitution, notwithstanding its provisions in regard to the initiative and referendum, could not be more explicit than it is in its use of the term as meaning such a representative body, and while in view of the initiative and referendum provisions the people of the State may constitute a part of the law-making power of the State, they certainly are not a part of 'the legislature' within the meaning of that term as used in our Constitution. By Section 1 of Article IV of the Constitution it is declared that the representative bodies designated as the Senate and Assembly, concerning the membership of which and the method of selecting the members Article IV makes provision, shall be designated 'The Legislature of the State of California,' and over and over again, wherever in the Constitution the legislature is referred to, it obviously and necessarily means the representative body provided for therein which is made up of the Senate and Assembly designated as above stated. The initiative and referendum provisions constitute simply a reservation of power *in the people* to propose and enact laws *independent* of *'the legislature,'*

and to adopt or reject any act of 'the legislature.' This has always been the meaning ordinarily attributed to the term in this country, and it is difficult indeed to conceive that the makers of the Constitution of the United States in providing for ratification *'by the legislatures* of three-fourths of the several States or by *convention* in three-fourths thereof, as the one or the other mode of ratification may propose by Congress,' intended by the words 'the legislatures' anything other than the representative law-making bodies of the several States."

The Michigan Supreme Court cited (*supra*) said:

"The term 'legislature' is thus defined. 'That body of men which makes the laws for a State or nation.' Bouvier's Law Dictionary (Rawle's Ed.), 17. And 'legislative power' as—

'Authority exercised by that department of government which is charged with the enactment of law as distinguished from the executive and judicial functions. The law-making power of a sovereign State.'

Counsel for the relators insist that under our State constitution—

'The power to legislate is vested in both the constituent assembly and the electors themselves.'

—that in writing Article V of the Federal Constitution its framers intended to submit an amendment to such legislative power for ratification and not merely to the legislative body known as the legislature.

We cannot but think that such an interpretation does violence to the plain meaning of the word 'legislature' as understood at the time the Federal Constitution was adopted. There were then law-making bodies, always referred to as 'legislatures' in all of the colonies which under the Constitution afterwards became States. This term is frequently used in the Constitution, and an examination will reveal the fact that in most cases it could not be applied other than to such assemblies.

It is suggested that the intent of the Constitution is simply 'to call the roll of States and get an expression from each State as to its will and desire.' In what way

shall such expression be voiced? The Constitution says by the 'legislatures.' In making response, the members act collectively and when a majority of those constituting such bodies respond in the affirmative, and such action is certified to the Federal authorities by a sufficient number of States, the amendment is adopted and is thereafter a part of the Constitution.

The action of the legislature in ratifying an amendment is not, strictly speaking, a legislative act. It is but one of several steps required to be taken to change the Federal Constitution. The congress, or the State by petition, must first propose an amendment. In order that it may become operative, it must receive the assent of the States by ratification in the manner provided in Article V. How shall such assent be expressed? By the adoption by the State legislature of a joint resolution ratifying the amendment. The State thus participates in the making of a new law simply by expressing its assent thereto in the manner provided. It has not thereby enacted a law any more than the President or Governor does so by approving bills passed by the Congress or legislature.

The language of Article V of our State constitution negatives the claim of relators. It provides: 'The legislative power of the State of Michigan is vested in a senate and house of representatives.' This is followed by the provisions relating to the referendum where in the right 'to prove or reject at the polls any act passed by the legislature' is reserved to the people. The framers of this instrument thus clearly distinguish between the legislative power vested in the legislature and the legislature itself. The former embraces the right to enact legislation, the latter the body in whom such right is primarily vested. Under the provisions which follow as to initiative and referendum, the people have no power to enact legislation until the proposal therefor has been submitted by petition to the legislature for action thereon. The right of the people to thus legislate in no way makes them a part of the legislature or changes the well-recognized meaning of that term.

* * *

The people in any State may, in their constitution, reserve to themselves the right to initiate and defeat State legislation by their vote. To the extent and in the manner therein provided, they, acting in conjunction with the legislature, constitute the law-making

power of the State. Each State, however, can participate in amending the Federal Constitution only in the manner provided therein. If the people want to secure the right to ratify amendments by popular vote thereon, they may do so by an amendment which shall provide, but such power rests only in the people themselves and should not be usurped by the courts through a judicial interpretation of the instrument itself. * * *

"It is our conclusion that the word 'legislature' as employed in Article V of the Federal Constitution was intended by its framers to mean the representatives of the people, elected to make the laws of the several States, when acting as a body, and that a State has no power through its constitution or by statute to restrict this action of the legislature by subjecting it to a review by popular vote."

The above decision is clear, convincing and logical.

THAT THE LEGISLATURE AS A REPRESENTATIVE BODY WAS MEANT, IS SHOWN BY

a. The process of adoption (pages 14 to 18, Brief 752.
b. The History of the Constitutional Convention (pages 18 to 23, Brief 752).
c. And by the decisions of the courts (pages 24 to 26, Brief 752).

We have made clear in our former brief that the process of adoption justified the construction of the term "legislature" for which we contend. The fact that the resolution to submit the amendments is not signed by the President as are all *acts* of Congress, and the fact that the Governor of the State is not required to sign the action of the legislature ratifying an amendment to the Federal Constitution, is strong proof that this action on the part of the legislature is that of a designated body rather than the action of a legislature exercising legislative power. This theory is sustained in principle by the case of Hollingsworth vs. Virginia, 3 Dall., 378, LL. Ed., 644, and various cases cited in former brief.

NEITHER CONGRESS NOR A STATE LEGISLATURE ACTS IN ITS CAPACITY AS A LAW-

MAKING BODY WHEN CONGRESS SUBMITS THE AMENDMENT OR THE LEGISLATURE RATIFIES IT. THIS IS MADE CLEAR BY THE PREVAILING NOTION OF THE FRAMERS OF THE CONSTITUTION.

To quote again from the Supreme Court of California:

> "At the time of the adoption of the Federal Constitution, as is shown by the brief of learned counsel for petitioner, every State had such a body, existing under one name or another, and, of course, it was to be assumed that in accord with our guaranteed republican form of government each State would always have such a body. Just what this *body* should be, what called, how constituted, whether bicameral in form or not, was a matter for each State to determine, but the essential characteristic of the thing was that it was a representative official body, invested with the functions of law making, the legislative official body of the State. That this conception of the meaning of the term was in the mind of the framers of the Constitution is shown by other provisions. Sec. 2 of Art. 1 providing that the House of Representatives shall be composed of members chosen by the people of the several States, provided that the electors thereof in each State 'shall have the qualifications requisite for electors of the most numerous branch of the *State Legislature*.' Obviously there can be no question as to the meaning of the term as there used. Sec. 3 of Art. 1 provided that the Senate of the United States 'shall be composed of two Senators from each State, chosen by the *legislature thereof*,' etc., and in Sub. 2 of the section it was provided that 'if vacancies happen by resignation or otherwise, during *the recess of the legislature*, which shall then fill such vacancies.' Obviously here again the term meant the official representative law-making body. In Sec. 4 it is provided the United States shall 'on application to the *legislature*, or of the executive (when *the legislature* cannot be convened) protect any State against domestic violence. Sub. 3 of Sec. 1 of Art. VI provides that the senators and representatives, 'and the members of the several State legislatures,' etc., shall be bound, by oath or affirmation to support the Constitution. In all these five instances it undubitably appears that by the term 'the legislature' was meant this representative body."

The Court then distinguished the Ohio case of State vs. Hilderbrandt, cited several cases and concluded as follows:

> "In each case it was a ratification by a *representative body* which, it was assumed, would correctly express the desire of the people of the State as to approval or rejection of the proposed amendment, and was apparently contemplated. The use of the words 'by *the legislatures* of three-fourths,' etc., itself implies this meaning. The words imply some official body of a State as distinguished from the State itself or the people of the State or the whole law-making power of the State. If anything differing from the ordinary conception of the term has been intended, or anything different from its plain and obvious meaning as used elsewhere in the Constitution in many instances, and so far as we can see in every other instance, it seems fair to assume that words indicating that meaning would have been used. It was said in McPherson vs. Blacker, 146 U. S., at page 27, 'The framers of the Constitution employed words in their natural sense; and where they are plain and clear, resort to collateral side of interpretation is unnecessary and cannot be indulged in to narrow or enlarge the text.' It is true enough that with regard to proposed amendments the idea was that each *State* should speak for itself in the matter of ratification by voting yea or nay thereon. But the further question considered by the framers of the Constitution was *in what manner the State* should *give its vote*, for that after all is what the State is doing when it joins in the ratification of a proposed amendment to the Federal Constitution, and, as in the case of the selection of senators from each State, the people of the United States saw fit to provide that the vote should be given by 'the legislature' of the State, doubtless concluding, whether correctly or not, that in this way the real desire of the people of the State would be correctly expressed. The adoption during recent years in many States of the initiative and referendum of course implies, as did the amendment of the Federal Constitution with relation to the selection of United States Senators, a conclusion on the part of very many people, that the representative body known as legislature cannot always be relied on to express the real desire of the people of

a State, but this view in as far as it finds expression in constitutions or statutes is certainly matter of comparatively recent origin. We must continually bear in mind that our sole question in this connection is what did *the framers of the Constitution* intend by the term 'The legislature of * * * the several States' in Article V, and that if by the term they intended the representative official bodies to which we have referred, as we think must be held, a State has no power to prescribe for itself a different ratifying power. All questions as to the good policy of such a provision, or whether it is in accord with the view entertained by very many today that the people of a State should have a vote on such a matter, are beside the question. The people of the United States in framing and enacting the Constitution have ordained in Article V thereof in language that we think admits of only one reasonable construction, that in the matter of ratifying a proposed amendment the people of the respective States shall speak on the question of ratification *solely and finally through their official representative legislative bodies, where the Congress* in submitting the amendment proposes that method of ratification."

The decisions of the Supreme Courts of the following States are in harmony with the persuasive opinions quoted above. The Oregon case reported in 180 Pacific Reporter, 328. The Supreme Court of Arkansas, in the case of Whittemore vs. Tyrel, 215 S. W., 636. The Colorado case, Ryan vs. Nolan; the Maine case, 107 Atlantic Reporter, 503. These decisions are a sufficient answer to the erroneous conclusion reached by the Supreme Court of the State of Ohio.

The dissenting opinion in the Ohio case states briefly and correctly the reasons why the majority opinion is wrong. If each State may adopt its own method of ratifying an amendment, the main purpose to be accomplished is amending the Constitution would be easily thwarted. Corrupt and entrenched evils could prevent entirely or delay the adoption of amendments to the Constitution in a manner that would preclude the possibility of remedying wrongs, that the overwhelming majority of the people desired to be

righted. Each State could have a different form of referendum. Provisions could be inserted in State constitutions to provide that the action of the legislature in ratifying an amendment or referendum could be had any time within ten years or longer. This would prevent any State from being counted on ratification until that time had elapsed.

If the Federal Constitution can be changed by the action of a single State or by a referendum, then it will be claimed that the legislature itself may rescind ratification. With forty-eight different kinds of referendum it would make the procedure for ratifying an amendment to the Constitution a complete farce. The barriers placed in the way of amendments to the Constitution are now almost unsurmountable. Fewer than two hundred members of the Senate in State legislatures can prevent the unanimous action and desire of over 6,300 Representatives and Senators in the legislative bodies of the forty-eight States. Only eighteen amendments have been adopted out of more than 2,500 proposed to Congress. The barrier as Prof. Ames, "On the Constitution," has said, makes it impossible to amend the Constitution until you practically have a revolution of sentiment in favor of a given amendment. To add to these difficulties, the possibility of forty-eight varieties of referendum or limitations placed in State constitutions, it would prevent action in cases where amendments are most needed. In other words, thirteen States could adopt referendum provisions to their constitutions with reference to some specified, recognized evil, which would preclude the possibility of making any change in the Constitution. While thirteen States may now prevent ratfication, the people have a chance with the election of each new legislature to express themselves anew. If an amendment to the Constitution of the United States can be held up until the time limit has expired in a State constitution for a referendum, a few States may make the time limit so long that it will mean in effect that no change can be made. Such a construction placed upon the Constitution of the United States is contrary to its original purpose; to the unbroken procedure during the

whole history of this country; and would open the doorway to the entrenchment of recognized evils, which in time would menace the very existence of the nation itself.

Those who desire a referendum on a Federal amendment or by the nation as a whole have the way open to secure such a change in the Constitution of the United States to accomplish that purpose. It should not be done by Court Construction, when it was never intended by the framers of the Constitution or by any fair meaning of the terms used in Article V.

The fact that Ohio has incorporated into her constitution a provision providing for a referendum, does not give legality to a procedure not authorized by Article V of the Federal Constitution. The framers of the Constitution realized that there would be conflicts between State and Federal legislation. They wisely provided by Article VI of the Constitution of the United States that the Constitution and the laws of the United States are supreme, State laws and State constitutions to the contrary notwithstanding.

This wise provision made by our forefathers precludes the possibility of irreconcilable conflict between State and nation. Article VI is the provision that harmonizes the differences between the State constitutions and the Federal Constitution, and the State laws and the Federal laws. It follows therefore that no added legal weight should be given to the referendum in Ohio, over that of any of the six States herein mentioned whose Supreme Courts have held that a referendum on a Federal amendment is unauthorized and void.

For these reasons and upon the authorities cited in the briefs filed in this case in opposition to the referendum, we respectfully submit that the court should hold that there is no authority in the Federal Constitution for ratification of a Federal Amendment except by the legislature of the State, or a convention chosen for that purpose, as one or the other method is designated by Congress.

WAYNE B. WHEELER,
JAMES A. WHITE.
Amici Curiae.

Supreme Court of the United States.

October Term, 1919. No. 583.

LOUIS DRAGO, *Petitioner,* *vs.* CENTRAL RAILROAD COMPANY OF NEW JERSEY, *Respondent.*	On Petition for Certiorari.

BRIEF FOR RESPONDENT.

Petitioner—plaintiff below—recovered a verdict for $10,000 against Central Railroad Company of New Jersey in the Hudson County Circuit Court, New Jersey. On appeal the Court of Errors and Appeals of New Jersey on September 2, 1919, reversed this judgment and ordered a trial *de novo*. Petitioner prays a writ of certiorari to review this judgment of reversal.

This case is controlled by *Chicago, Rock Island & Pacific R. R. Co. vs. Bond*, 240 U. S., 449. The Court of Errors and Appeals following the *Bond* case, reversed the judgment of the trial Court.

Petitioner was not an employee of the Central Railroad Company of New Jersey. He was employed by Railroad Stevedoring Corporation, a New Jersey corporation, doing stevedoring work only. While engaged for that Company on a railroad pier unloading railroad cars for the Stevedoring Company he was injured. He sought

to have it held that the contract between the Railroad Company and the Stevedoring Company was void under Section 5 of Federal Employers' Liability Act. Since, however, plaintiff was not in the employ of the Railroad Company he did not come within the meaning of the Federal Employers' Liability Act, for that applies only to employees of interstate carriers by railroad while engaged in interstate commerce. The case is on all fours with the *Bond* case, *supra,* with this difference: Turner in the Bond case was denied rights under the Federal Employers' Liability Act because he was held to be an independent contractor and hence not an employee of the carrier. Drago in this case was an employee of an independent contractor. Since an independent contractor was held not to be an employee within the meaning of the statute it follows that an employee of an independent contractor does not come within the statute.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

JAMES D. CARPENTER, JR.,
Of Counsel with Respondent.